COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

A REVIEW OF THE RATES AND CHARGES ) AND INCENTIVE REGULATION PLAN OF ) SOUTH CENTRAL BELL TELEPHONE COMPANY ) CASE NO. 90-256

O R D E R

This matter arising upon motion of South Central Bell Telephone Company ("South Central Bell") filed February 19, 1991 for reconsideration of two Orders entered February 11, 1991 denying confidential protection of South Central Bell's responses to Request Item D-Revenues, 1b, of the Commission's Order of October 25, 1990 and Items 67, 88, 91, 92, 93 and 94 of the Attorney General's Request No. 2 on the grounds that the information is exempt from disclosure under KRS 61.878(1)(b), and that disclosure of the information is likely to cause South Central Bell competitive injury, and it appearing to this Commission as follows:

South Central Bell petitioned the Commission on November 12, 1990 and modified its petition on December 17, 1990 to protect as confidential its responses to portions of Request Item D-Revenues, 1b, of the Commission's Order of October 25, 1990. South Central Bell again petitioned the Commission on January 4, 1991 to protect as confidential its responses to various requests of the Attorney General, including Items 67, 88, 91, 92, 93 and 94 of the Attorney General's Request No. 2. By separate Orders entered February 11, 1991, confidential protection of the information was denied and this petition seeks reconsideration of those Orders.

The original petition sought protection of the information under regulation 807 KAR 5:001, Section 7. That regulation is derived from the provisions of KRS 61.878(1)(b) which exempts qualifying commercial information from the provisions of KRS 61.870 through KRS 61.884, otherwise known as the Kentucky Open Records Act. South Central Bell contends that regulation 807 KAR 5:001, Section 7, is more restrictive than KRS 61.878(1)(b) and as a result, the regulation is invalid.

It is well settled that an administrative agency may not by rule or regulation expand or diminish the provisions of a statute. Robertson v. Shien, 204 S.W.2d 954, 957 (Ky. 1947); Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959). Thus, in applying the exemption, the Commission recognizes that it must adhere to a standard that falls within the statutory provisions. The standard adopted by the Commission and set forth in the original Orders from which South Central Bell now seeks reconsideration must, therefore, be neither more nor less restrictive than the statute. The discussion below demonstrates that the standard adopted by the Commission in applying the exemption meets this requirement.

The object of the Open Records Act, as declared in KRS 61.872(1), is that "all public records shall be open for inspection" unless specifically exempted. To meet that objective, KRS 61.876(1) directs each public agency to formulate procedures that the public can use to gain access to an agency's records.

The Commission has complied with this directive by promulgating 807 KAR 5:001, Section 7.

Under the Act, public agencies may only withhold from public inspection records exempted from the right to inspection by KRS 61.878(1). One of those exemptions, contained in subsection (1)(b), pertains to commercial information. To qualify for this exemption, the statute specifically requires that commercial information must meet the following three criteria: (1) the information was submitted to the agency in confidence; (2) the information is generally recognized as confidential or was submitted for the grant or review of a license to do business; and (3) the disclosure of the information would permit an unfair advantage to competitors. This exemption is comparable to similar provisions found in other open records legislation. The federal Freedom of Information Act, 5 USCA 552 (b)(4), for example, exempts from its provisions, "trade secrets and commercial or financial information obtained from a person as privileged or confidential." In construing that exemption, the court, in Sharyland Water Supply Corporation v. Black, 755 F.2d 397, 399 (1985), set forth the following conditions for determining whether commercial information should be protected as confidential:

> Information is "confidential" only if its disclosure "is likely. . .to impair the government's ability to obtain necessary information in the future. . .or to cause substantial harm to the competitive position of the person from whom the information was obtained." [National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974)] To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidential material, not conclusory or generalized allegations, that it actually

faces competition and that substantial competitive injury would result from disclosure.

The standard adopted by this Commission in exempting commercial information from public disclosure is identical to the standard adopted by the federal court in the Sharyland decision. In order to obtain protection under KRS 61.878(1)(b) for commercial information, this Commission requires it to be established that disclosure of the information is likely to cause competitive injury to the party from whom the information was obtained. To satisfy this requirement, the party claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is publicly disclosed. Therefore, as stated in Sharyland, supra, the issues to be resolved in any petition for protection of commercial information submitted to the Commission in confidence are whether the information pertains to business operations for which there is actual competition and, if so, whether disclosure of the information is likely to provide competitors with an unfair business advantage.

The information sought to be protected by these petitions concerns the revenues and expenses related to the publication and distribution of telephone directories for South Central Bell and the sale of Yellow Page advertising. These services are provided to South Central Bell by BellSouth Advertising and Publishing Company ("BAPCO"). In denying confidential protection for the information in the February 11, 1991 Orders, the Commission found that BAPCO, as a BellSouth Corporation ("BellSouth") subsidiary, did not have any competition for the service it provided. In its petition for reconsideration, South Central Bell strenuously contends that BAPCO's relationship with South Central Bell is similar to the relationship that exists between other telephone companies and directory publishers nationwide, and that the Commission's finding that it faces no competition is erroneous.

As noted in our earlier Orders, BAPCO and South Central Bell are wholly owned subsidiaries of BellSouth. BAPCO's primary function is to compile, publish, deliver and market telephone directories for Southern Bell and South Central Bell operating companies, all of whom are also subsidiaries of BellSouth. As part of its function, BAPCO sells both Yellow Page and White Page advertising in its directories either directly or, as in the case of Kentucky, through subcontractors. The subcontractor responsible for the sale of advertising in Kentucky is L. M. Berry and Company ("L. M. Berry"). BAPCO is compensated by receiving a share of the directory revenues apparently generated primarily from the sale of advertising. BAPCO, in turn, compensates L. M. Berry on a commission basis.

BellSouth Information Systems ("BIS") is also a wholly owned subsidiary of BellSouth. It provides computer based systems services to BellSouth affiliates, including BAPCO. Given these circumstances, it is clear that a special relationship exists between BellSouth, BIS, BAPCO and even L. M. Berry. They are all under common ownership and they are all engaged in a common endeavor, the sale and promoting of yellow page advertising. Therefore, the issues presented by the petition here for reconsideration are whether BellSouth, BIS, BAPCO and L. M. Berry face competition in their sale and promotion of yellow page advertising, and if they do, whether their competitors would derive an unfair advantage by disclosure of the information they have petitioned be protected as confidential.

Both BAPCO and South Central Bell earn revenue from the sale of advertisements in the telephone directories published by BAPCO for South Central Bell. In this endeavor, they compete with five other directory publishers in Kentucky who collectively publish 13 directories in Kentucky. Therefore, if the information sought to be protected would enable these other directory publishing companies to more effectively compete with South Central Bell and BAPCO, the information should be protected from disclosure.

The information filed in response to Request Item D-Revenues, 1b, of the Commission's Order of October 25, 1990, which South Central Bell seeks to protect, consists of the net income realized by BAPCO for the 12-month period ending June 30, 1990, BAPCO's net investment allocated to Kentucky operations as of June 30, 1990, and the return on investment as of June 30, 1990. The information filed in response to Item 67 of the Attorney General's Request No. 2 consists of the gross dividends received by South Central Bell from BAPCO, L. M. Berry, and BIS for 1987, 1988, 1989, and part of 1990. The information provided in response to Item 88 of the Attorney General's Request No. 2 provides the gross publishing fee paid from BAPCO to South Central Bell for its Kentucky operations in 1989. All of this information is provided in the aggregate and is too general to be of any significant use to South Central Bell competitors.

Likewise, the responses to Items 91, 92, 93 and 94 are too general to be of any competitive value. Item 91 contains the net income from L. M. Berry's Kentucky Yellow Page operations for 1986 through 1990, and Item 92 contains L. M. Berry's gross expenses for those years. Item 93 contains the gross commissions paid to L. M. Berry by BAPCO from the sale of national Yellow Page advertisements from 1984 through 10 months of 1990, and the response to Item 94 contains the gross expenses incurred by L. M. Berry for those services during that period. Because of the general nature of this information, it would have no competitive value and is not entitled to protection.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The petition for reconsideration of the Commission's Orders of February 11, 1991 denying confidential protection to South Central Bell's responses to Item D-Revenues, 1b, of the Commission's Order of October 25, 1990 and Items 67, 88, 91, 92, 93 and 94 of the Attorney General's Request No. 2 be and is hereby denied.

2. The information sought to be protected from disclosure shall be held as confidential and proprietary for a period of five working days from the date of this Order, at the expiration of which time it shall be placed in the public record.

Done at Frankfort, Kentucky, this 11th day of March, 1991.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director